

### **IC 4-21.5-3.5**

#### **Chapter 3.5. Mediation**

### **IC 4-21.5-3.5-1**

#### **Mediation guidelines; procedural rights; rules**

Sec. 1. (a) Except as provided in subsections (b) and (c), the mediation guidelines adopted by rule under this chapter must supplement the procedural rights established by this article.

(b) An agency described in IC 4-21.5-2-4 that is exempt from administrative orders and procedures required under IC 4-21.5 may adopt rules consistent with this chapter for the use of mediation to resolve proceedings.

(c) An agency may elect to use the mediation provisions of this chapter for determinations described in IC 4-21.5-2-6 that are exempt from the administrative orders and procedures required under IC 4-21.5.

*As added by P.L.16-1996, SEC.1.*

### **IC 4-21.5-3.5-2**

#### **Appropriateness of mediation; rules**

Sec. 2. (a) For each type of administrative proceeding, the ultimate authority shall determine whether mediation is an appropriate means of alternative dispute resolution.

(b) For proceedings that an ultimate authority determines to be appropriate for mediation, the agency may adopt rules under IC 4-22-2 to implement this chapter. The rules, to the extent possible, shall not be inconsistent with Rule 2 of the Indiana Supreme Court Rules for Alternative Dispute Resolution.

*As added by P.L.16-1996, SEC.1.*

### **IC 4-21.5-3.5-3**

#### **Agreement to mediate**

Sec. 3. Before a proceeding is initiated, an agency and a person who may be the subject of an agency action may agree to use mediation to resolve a dispute.

*As added by P.L.16-1996, SEC.1.*

### **IC 4-21.5-3.5-4**

#### **Immunity of mediator**

Sec. 4. A mediator, co-mediator, or team mediator appointed and acting under this chapter has immunity in the same manner and to the same extent as a judge having jurisdiction in Indiana.

*As added by P.L.16-1996, SEC.1.*

### **IC 4-21.5-3.5-5**

#### **Selection of proceeding for mediation; objections**

Sec. 5. (a) If a proceeding is of a type that has been identified as appropriate for alternative dispute resolution under section 2 of this chapter, the administrative law judge assigned to the proceeding may, on the administrative law judge's own motion or upon motion

of any party, select the proceeding for mediation.

(b) Not more than fifteen (15) days after an order of selection for mediation, a party may object by filing a written objection specifying the grounds. The administrative law judge shall promptly consider an objection to mediation and any response to the objection and shall reconsider whether the proceeding is appropriate for mediation.

(c) In considering an order for mediation under this section, the administrative law judge shall consider:

- (1) the willingness of the parties to mutually resolve their dispute;
- (2) the ability of the parties to participate in the mediation process;
- (3) the need for discovery and the extent to which it has been conducted; and
- (4) any other factors that affect the potential for fair resolution of the dispute through the mediation process.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-6**

##### **Selection of mediator by agreement of parties**

Sec. 6. (a) If a proceeding is conducted by mediation, the administrative law judge assigned to the proceeding shall within fifteen (15) days after the date of the order for mediation make available to the parties, at no cost, a mediator who is qualified under section 8 of this chapter, or the parties may elect to use, at their own cost, an outside mediator who is:

- (1) qualified under section 8 of this chapter; and
- (2) approved by the administrative law judge assigned to the proceeding.

(b) If a mediator is not selected by agreement or choice under subsection (a), the administrative law judge assigned to the proceeding shall designate three (3) mediators from the approved list of mediators described in subsection 7(d) and allow fifteen (15) days for alternate striking by each side. The party initiating the proceeding shall strike first. The mediator remaining after the striking process is the mediator.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-7**

##### **Application to mediate; list of approved mediators**

Sec. 7. (a) A person, other than agency personnel, who wishes to serve as a mediator under this chapter shall file an application with the ultimate authority or its designee describing the type of proceeding in which the person desires to serve as a mediator and setting forth qualifications as required by section 8 of this chapter and the rules adopted under this chapter.

(b) A mediator must reapply if required by the rules.

(c) The administrative law judge assigned to a proceeding may allow mediation teams and co-mediators.

(d) The ultimate authority or its designee that uses mediation for

dispute resolution shall maintain a list of approved mediators and the types of proceedings in which each mediator is authorized to serve. A mediator may be removed from the approved list for good cause, after a hearing.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-8**

##### **Qualifications to mediate**

Sec. 8. A person who applies to be a mediator under this chapter must have:

- (1) completed at least forty (40) hours of mediation training in courses certified as appropriate for mediation training by the Indiana commission for continuing legal education;
- (2) received a minimum of five (5) hours of mediation training during the two (2) year period before application; and
- (3) received a minimum of five (5) hours of mediation training during the two (2) year period before reapplication if reapplication is required by the agency involved.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-9**

##### **Guidelines for mediator selection if parties do not agree**

Sec. 9. If rules are adopted under section 2 of this chapter, the rules must include guidelines for selection of a mediator for the ultimate authority when there is no appropriate mediator or listed mediator available and the parties cannot agree on an unlisted mediator.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-10**

##### **Choice not to serve as mediator**

Sec. 10. A person selected to serve as a mediator under this chapter may choose not to serve for any reason.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-11**

##### **Replacement of mediator**

Sec. 11. At any time, a party to a proceeding may request that the administrative law judge replace the mediator of the proceeding for good cause.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-12**

##### **Effect if mediator chooses not to serve**

Sec. 12. If a mediator chooses not to serve or the administrative law judge decides to replace a mediator, the mediator selection process described in this chapter shall be repeated.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-13**

**Mediator ineligibility**

Sec. 13. A mediator may not be selected to mediate a proceeding if the mediator:

- (1) has an interest in the outcome of the proceeding;
- (2) is related to any of the parties or attorneys in the proceeding;
- or
- (3) is employed by any of the parties or attorneys involved in the proceeding, except that an employee of the agency involved may serve as a mediator if the employee of the agency:
  - (A) has not participated in the investigation or prosecution of the dispute; and
  - (B) does not otherwise have an interest in the outcome of the proceeding.

*As added by P.L.16-1996, SEC.1.*

**IC 4-21.5-3.5-14****Mediation costs**

Sec. 14. (a) If the parties to a proceeding elect to use an outside mediator, the costs of mediation must be paid as agreed by the parties. If there is no agreement of the parties, the administrative law judge assigned to the proceeding shall determine the mediation costs, if necessary, and equitably divide the mediation costs among the parties.

(b) To make the determination required by subsection (a), the administrative law judge shall consider the following:

- (1) The complexity of the litigation.
- (2) The skill levels needed to mediate the proceeding.
- (3) The ability of a party to pay.

(c) Mediation costs must be paid not more than thirty (30) days after the mediation is completed unless otherwise agreed among the mediator and the parties.

*As added by P.L.16-1996, SEC.1.*

**IC 4-21.5-3.5-15****Continuance of proceedings**

Sec. 15. If a proceeding is selected for mediation, the administrative law judge assigned to the proceeding shall continue the proceeding until the mediation is completed.

*As added by P.L.16-1996, SEC.1.*

**IC 4-21.5-3.5-16****Duties of mediator**

Sec. 16. A mediator for a proceeding under this chapter shall:

- (1) inform the parties of the anticipated cost of mediation;
- (2) advise the parties that the mediator does not represent either or both of the parties;
- (3) define and describe the process of mediation to the parties;
- (4) disclose the nature and extent of any relationships with the parties and any personal, financial, or other interest that may result in bias or a conflict of interest;

- (5) advise each of the parties to consider independent legal advice;
- (6) disclose to the parties or their attorneys any factual documentation revealed during the mediation if at the end of the mediation process the disclosure is agreed to by both parties;
- (7) inform the parties of the extent to which information obtained from and about the participants through the mediation process is not privileged and may be subject to disclosure;
- (8) inform the parties that they may introduce the written mediated agreement into evidence if the agreement is signed by all parties to the dispute;
- (9) advise the parties of the time, date, and location of the mediation at least ten (10) days in advance, unless a shorter period is agreed to by the parties; and
- (10) advise the parties of all persons whose presence at the mediation might facilitate settlement.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-17**

##### **Individuals present at mediation**

Sec. 17. (a) The parties and their attorneys, if any, must be present at any mediation session unless otherwise agreed. A mediator may allow nonparties to the dispute to be present at a mediation session if the parties agree.

(b) All parties, attorneys with settlement authority, representatives with settlement authority, and necessary individuals must be present at each mediation conference to facilitate settlement of a dispute, unless excused by the administrative law judge.

(c) Mediation sessions are not open to the public.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-18**

##### **Confidential statements; nonpublic records**

Sec. 18. (a) The attorney for a party to a proceeding may submit to the mediator a confidential statement of the proceeding, not to exceed ten (10) pages, before a mediation conference. The statement submitted under this section must include the following:

- (1) The legal and factual contentions of the party.
- (2) The factors considered in arriving at a settlement posture.
- (3) The settlement negotiations to date.

(b) A confidential statement under this section may be supplemented by exhibits or evidence that must be made available to the opposing party or the opposing party's counsel at least five (5) days before the mediation conference.

(c) A confidential statement is privileged and confidential unless an agreement by the parties to the contrary is provided to the mediator.

(d) If the mediation process does not result in settlement, any submitted confidential statement must be returned to the submitting attorney or party.

(e) Notwithstanding IC 4-21.5-4-6, the following are not public records or part of the agency record, gathered by the mediator in the course of mediation, in a proceeding:

- (1) A confidential statement.
- (2) Exhibits.
- (3) Evidence.
- (4) Other information.
- (5) Draft settlement documents.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-19**

##### **Mediator meetings with parties**

Sec. 19. In the mediation process, the mediator may meet jointly or separately with the parties and may express an evaluation of the proceeding to one (1) or more parties or their representatives. This evaluation may be expressed in the form of settlement ranges rather than exact amounts. The mediator may share revealed settlement authority with other parties or their representatives.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-20**

##### **Termination of mediation**

Sec. 20. (a) As soon after mediation as practicable, the mediator shall report to the administrative law judge that the mediation process has been completed, terminated, or extended.

(b) The mediator shall terminate mediation whenever:

- (1) the mediator believes that continuation of the process would harm or prejudice one (1) or more of the parties; or
- (2) the ability or willingness of any party to participate meaningfully in mediation is lacking to the extent that a reasonable agreement is unlikely.

(c) After at least two (2) mediation sessions have been completed, any party may terminate mediation. The mediator may not state the reason for termination except when the termination is due to conflict of interest or bias on the part of the mediator, in which case another mediator may be assigned to the proceeding by the administrative law judge for the proceeding.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-21**

##### **Failure to reach agreement; requirements for agreement**

Sec. 21. (a) If the parties do not reach an agreement on any matter as a result of mediation, the mediator shall report the lack of an agreement without comment or recommendation to the administrative law judge assigned to the proceeding. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party that, if resolved or completed, would facilitate the possibility of a settlement.

(b) An agreement as a result of mediation must be in writing and

signed by the parties. The agreement must be filed with the administrative law judge assigned to the proceeding. If the agreement is complete on all issues, it must be accompanied by a joint stipulation of disposition. Upon approval of a joint stipulation of disposition by the administrative law judge, it has the same force and effect as an agreed order approved by an administrative law judge from the agency involved.

(c) An approved joint stipulation of disposition under this chapter is considered a contract between the parties.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-22**

##### **Ability to mediate subsequent disputes**

Sec. 22. A person who has served as a mediator in a proceeding may act as a mediator in subsequent disputes between the parties, and the parties may provide for a review of the agreement with the mediator on a periodic basis. However, the mediator shall decline to act in any capacity, except as a mediator, unless the subsequent association is clearly distinct from the mediation issues.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-23**

##### **Conflicts of interest**

Sec. 23. A mediator is required to use an effective system to identify potential conflict of interest at the time of appointment to a proceeding as a mediator. The mediator may not subsequently act as an investigator or make any recommendations regarding the mediated proceeding. A person may not serve as an administrative law judge in a subsequent hearing of a matter in which the person served as a mediator.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-24**

##### **Rules of evidence do not apply**

Sec. 24. With the exception of privileged communications, the rules of evidence do not apply to mediation, but factual information having a bearing on the question of damages should be supported by documentary evidence whenever possible.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-25**

##### **Limitation of discovery**

Sec. 25. Whenever possible, parties to a proceeding are encouraged to limit discovery to the development of information necessary to facilitate the mediation process. By agreement of the parties, or as ordered by the administrative law judge, discovery may be deferred during mediation.

*As added by P.L.16-1996, SEC.1.*

#### **IC 4-21.5-3.5-26**

**Mediation regarded as settlement negotiation**

Sec. 26. (a) Mediation shall be regarded as a settlement negotiation. Evidence of furnishing or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim that was disputed as to either validity or amount is not admissible in a proceeding to prove liability for or invalidity of the claim or its amount.

(b) Evidence of conduct or statements made in the course of mediation is not admissible. However, this subsection does not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of the mediation process. This subsection does not require exclusion when the evidence is offered for another purpose, such as bias or prejudice of a witness or negating a contention of undue delay.

*As added by P.L.16-1996, SEC.1.*

**IC 4-21.5-3.5-27****Confidential and privileged nature of mediation**

Sec. 27. (a) A mediator is not subject to process requiring disclosure of any matter discussed during the mediation. Matters discussed during mediation are confidential and privileged.

(b) The confidentiality requirement of subsection (a) may not be waived by the parties.

(c) An objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the mediator.

*As added by P.L.16-1996, SEC.1.*